IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8182 OF 2007

Balkeesh Mehboobjan Sahib
and Ors. .. Petitioners

Versus

Dharmesh Tulsidas Parekh & Ors. .. Respondents

Mr.Vaibhav Joglekar i/b. S.M.Kazi for petitioners
Mr.P.J.Ramchandani for respondent Nos.1, 2, 4 to 7.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 4th December 2007

P.C.

. Heard Counsel for respective parties.

2. Mr.Joglekar appearing in support of this petition submits that the evidence of the Rent Collector which has been relied upon by the Courts below is full of inconsistencies and could not have been believed. The Rent Collector, who was deposing on 8th February 2002 mentioned his age as 44 years. The events that he narrates of subletting or induction of the original defendant No.2 in the premises are of the year 1975. It is inconceivable that the person was in service as Rent Collector when he was hardly 15 years of age. In such circumstances, relying upon his version, the suit filed by the respondents for eviction of petitioners from the suit premises on the ground of unlawful subletting, could not have been decreed.

3. On the other hand Mr.Ramchandani appearing for original plaintiffs submits that the suit was filed on the ground that the premises have been sublet illegally. In response

to the suit, written statement was filed wherein, specific case of the second defendant - predecessor in title of the petitioners before me is that he was in the suit premises from inception of the tenancy as he was inducted as a licensee therein by the Orig.Defendant No.1. Therefore, it cannot be said that his possession is unlawful and unauthorised. My attention is invited to paras 4 and 5 of the written statement in this behalf. For all these reasons, according to Mr.Ramchandani, the petition is devoid of any merits and deserves to be rejected.

4. With the able assistance of the learned Counsel for both sides, I have perused the petition and annexures thereto. The original plaintiff filed this suit in the year 1976 on the ground that the original defendant No.1 was, until his tenancy was determined by notice to quit dated 24th December 1975 a monthly tenant in respect of Room No.11/4, First floor, Naju

Mansion, 54, Woodhouse Road, Colaba, Mumbai. He has unlawfully sublet the premises prior to one year of the institution of the suit, to defendant No.2, the original defendant No.2 being Mr.Mehboobjan Saheb, who is represented before me by his legal heirs and representatives i.e. present petitioners. The alleged subtenancy is of 1975 and that is how the suit was instituted for possession.

5. Points of defence/written statement specifically state that the suit notice was received, reply was sent thereto and in any event, the second defendant admitted his exclusive possession since inception of tenancy as licensee of the first defendant and set up a case that leave and licence was subsisting, it was not revoked and that is how, he gets protection of the amended Bombay Rent (Lodging Houses Rates) Control Act, 1947 (Rent Act for short).

6. The parties went to trial on this case and necessary issues were framed. Evidence of the Rent Collector demonstrates that no where did the petitioner put a case to him that he has not visited the suit premises or that he does not recollect the events. On the other hand, the suggestion given to him that he is not a rent controller, has been specifically denied. The deposition will have to be read as a whole and it is not possible to agree with Mr.Joglekar that it is not capable of being relied upon. In the peculiar facts of the case and when the exclusive possession is not disputed but a case of premises being lawfully occupied by virtue of the provisions of the Rent Control Act being raised, then, the petitioners were obliged to prove the same. The lower appellate court has observed in para 13 as under:-

"13. As stated above once it is

accepted by defendants that defendant No.2 is in the premises and that defendant No.1 is tenant then he is required to prove his status as subtenant and protected under the provisions of law. Total burden as stated above is on the defendant No.2. Question comes up was he in the suit premises as subtenant prior to 1st February 1973. To prove this aspect widow of defendant No.2 deposed and she is not aware when her husband entered in the premises. She tried to establish the relation with defendant No.1 as brother in law of defendant No.2 but there is no material. There is variance in her own statement. Forgetting all these things moot question remains whether defendant No.2's heirs established their status as protected subtenant. As noted above there is no any material on record, worth accepting

> even from the version of defendant No.2 that defendant No.2 was in the suit premises prior to 1.2.1973. No doubt attempt is done to contend that he is there right from beginning but there is no material to prove it. We have gone through minutely the evidence of defendant No.2A which is not adding any strength to her claim. Though attempt is done to challenge the status of rent collector but he has placed on record his letter of authority that too in cross examination, hence that aspect is clear in itself."

7. Prior thereto, it has also referred to the undisputed facts. The original defendant No.1 did not step into the box. There is nothing produced on record to prove the case set up in the written statement of the leave and licence fructifying into something more on the relevant

date i.e. 1st February 1973 so as to get protection as deemed tenant. In such circumstances, concurrent findings of fact based as they are on oral and documentary evidence cannot be interfered with. This is not a court of further appeal which could reappraise and reappreciate the factual position. More so, when no error apparent or perversity is disclosed. The impugned orders do not require any interference. Petition dismissed.

8. At this stage Mr.Joglekar requests that the petitioner be granted some time to vacate the premises. Request is opposed. However, considering that the petitioners before me are the widow and other legal heirs of the deceased original defendant No.2 and they have been in possession for number of years, interest of justice would be sub-served if time to vacate is granted till 31st December 2008 provided the petitioners execute undertaking in this court

within two weeks from today to the following effect:-

(a) The petitioners shall not create any third party interest, or part with possession or alienate, encumber with the possession of the suit property;

(b) that the petitioner shall vacate the premises on or before 31st December 2008;

(c) that within three months from today all arrears would be paid;

(d) that the petitioners would also pay rent till such time as they are in possession of the premises;

Petition dismissed. No costs.

(S.C.Dharmadhikari, J)